B.C.D. 06-14

**Employee Status**
**MC**

APR 10 2006

This is the decision of the Railroad Retirement Board regarding whether the services performed by MC for Norfolk Southern is creditable service under the Railroad Retirement Act (45 U.S.C. § 231 et seq.) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351 et seq.). The Board's Office of Programs has requested a determination regarding this issue.

MC states that he performs freight car inspections for Norfolk Southern Corporation. Prior to his retirement, he was an employee of Norfolk Southern and supervised other employees in building and inspecting freight cars. He states that he is not supervised and determines his own working hours. The length of service is indefinite (apparently he works "as needed") and he states that he is not supervised and does not supervise people. MC is paid $250.00 per day plus expenses such as meals, lodging, car rental, etc. He receives no fringe benefits and is responsible for any tax liability. He works on the premises of Norfolk Southern. The contract with Norfolk Southern entered into on or about December 3, 2004, was with MC personally. The contract was modified on March 18, 2005, to substitute M&B Contracting and Consulting, LLC, a limited liability company.

MC and his spouse, RC, are members of M&B Contracting and Consulting, LLC. He receives a 50 percent share of the profits and distributions, up to $12,000.00, the current annual exempt amount (i.e., the amount of earnings below which there is no reduction in an annuity due to earnings). MC receives a salary, plus 50 percent of any of profits in excess of $24,000.00. MC has certain expenses associated with his work which are reimbursed by Norfolk Southern.

In response to the agency's request for comments on MC's description of his services, Michael J. Adamczyk, Manager Car Maintenance, Norfolk Southern, supplied the following description of Mr. Crowder's work:

> MC has been employed on a consulting basis to inspect Bad Order freight cars verifying or updating information in our Bad Order database. At the direction of another retired NS employee who is also on contract, he traveled to many locations on Norfolk Southern property where BO cars were stored. Upon arrival he consulted with local NS mechanical supervisors about cars and their physical location in the yard. He located those cars and inspected them, estimating the cost to repair and recording that data on an NS supplied form. He may have been

accompanied by a local supervisor during the inspections as a courtesy for assistance in locating the cars, transportation within the train yard, as well as for information sharing and safety concerns.

Section 1(b) of the Railroad Retirement Act (RRA) and section 1(d) of the Railroad Unemployment Insurance Act both define a covered employee as an individual in the service of an employer for compensation. Section 1(d)(1) of the RRA further defines an individual as "in the service of an employer" when:

> (i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations; and
>
> (ii) he renders such service for compensation * * *.

Section 1(e) of the RUIA contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the RRTA (26 U.S.C. §§ 3231(b) and (d)).

As the above definitions would indicate, the determination of whether or not an individual performs service as an employee of a covered employer is a fact-based decision that can only be made after full consideration of all relevant facts. In considering whether the control test in paragraph (A) is met, the Board will consider criteria that are derived from the commonly recognized tests of employee-independent contractor status developed in the common law. In addition to those factors, in considering whether paragraphs (B) and/or (C) apply to an individual, we consider whether the individual is integrated into the employer's operations. The criteria utilized in an employee service determination are applied on a case-by-case basis, giving due consideration to the presence or absence of each element in reaching an appropriate conclusion with no single element being controlling. Because the holding in this type of determination is completely dependent upon the particular facts involved, each holding is limited to that set of facts and will not be automatically applied to any other case.

The focus of the test under paragraph (A) is whether the individual performing the service is subject to the control of the service-recipient not only with respect to the outcome of his work but also with respect to the way he performs such work.

There is no evidence that MC is under the direction and control of Norfolk Southern employees. There is no evidence that he receives any instructions from Norfolk Southern employees or supervision of any kind. It should be noted that his contractual work for Norfolk Southern is apparently different from his former work as an employee, where he supervised other Norfolk Southern employees.

The tests set forth under paragraphs (B) and (C) go beyond the test contained in paragraph (A) and could hold an individual a covered employee if he is integrated into the railroad's operations even though the control test in paragraph (A) is not met. The Board finds that MC is an employee of Norfolk Southern, if not under paragraph (B) above, then under paragraph (C). The services which MC performs are personal. He is not at liberty to substitute some other individual and, as mentioned above, the contract originally was between Norfolk Southern and MC personally, rather than between the limited liability company and Norfolk Southern. The services are being performed on Norfolk Southern property, and car inspections, under the conditions described, are integrated into the operations of the Norfolk Southern.

Under an Eighth Circuit decision consistently followed by the Board, the tests under paragraphs (B) and (C) do not apply to employees of independent contractors performing services for a railroad where such contractors are engaged in an independent trade or business. See Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 206 F. 2d 831 (8th Cir. 1953). Thus, under Kelm, the question remaining to be answered is whether the limited liability company is an independent contractor. Courts have faced similar considerations when determining the independence of a contractor for purposes of liability of a company to withhold income taxes under the Internal Revenue Code (26 U.S.C. § 3401(c)). In these cases, the courts have noted such factors as whether the contractor has a significant investment in facilities and whether the contractor has any opportunity for profit or loss; e.g., Aparacor, Inc. v. United States, 556 F. 2d 1004 (Ct. Cl. 1977), at 1012; and whether the contractor engages in a recognized trade; e.g., Lanigan Storage & Van Co. v. United States, 389 F. 2d 337 (6th Cir. 1968) at 341. In this case, it does not appear that MC has any investment in the limited liability company or any opportunity for profit or loss. It appears that the limited liability company's only customer is Norfolk Southern. Accordingly, it is the opinion of a majority of the Board that the limited liability company is not an independent business, and that the exclusion under Kelm would not apply.

Accordingly, a majority the Board finds that the services performed by MC beginning December 3, 2004, under the contract between him and Norfolk Southern, later modified to be between the limited liability company and Norfolk Southern, were and are being performed by MC as an employee of Norfolk Southern.

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr.

Jerome F. Kever (Dissenting)